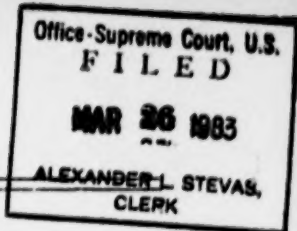


No. 82-1281



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

SEELLY & SANDS, INC. and
BUCKEYE UNION INSURANCE CO.,

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF PENNSYLVANIA

APPELLANTS' BRIEF IN OPPOSITION
TO MOTION TO DISMISS

JACK W. PLOWMAN
Counsel of Record
MARSHALL J. CONN
Plowman and Spiegel
3400 Grant Building
Pittsburgh, PA 15219
(412) 471-8521

Counsel for Appellants

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY OF ARGUMENT	1
SUPPLEMENT TO STATEMENT OF THE CASE	2
ARGUMENT	
Because the Commonwealth Court misconstrued the waiver language contained in the bid instruc- tions, any "non-federal" basis for denying relief to Appellants was meritless; hence, the Penn- sylvania Supreme Court could not have rested its judgment of affirmance on a "non-federal" ground.	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<u>Stembridge v. State of Georgia,</u> 343 U.S. 541, 72 S.Ct. 834 (1952)	8
<u>Williams v. Wenger,</u> 319 Pa. 73, 179 A. 242 (1935)	8

INTRODUCTION
and
SUMMARY OF ARGUMENT

The Appellee asserts in its Motion to Dismiss that the Pennsylvania Commonwealth Court "also found against the Appellants on the independent non-federal ground that Shelly & Sands expressly waived any right to withdraw its bid except pursuant to certain procedures...." (Motion to Dismiss, p. 4)

This "non-federal" finding by the Pennsylvania Commonwealth Court cannot be supported by reference to the evidence that was before it. The Court considered certain provisions of the bid instructions section entitled "Withdrawal of Proposals," but it failed to consider other critical provisions of that section. The result was patent error. It cannot rationally be advocated that the Pennsylvania Supreme

Court "might" have rested its judgment on a non-federal ground which is patently erroneous, particularly when the federal ground for judgment -- although considered here to be likewise erroneous -- was at least colorable. Accordingly, this Court should address the federal constitutional issue explicated in Appellants' Jurisdictional Statement.

SUPPLEMENT TO STATEMENT
OF THE CASE

The Commonwealth Court referred to certain provisions of the subject bid instructions entitled "Withdrawal of Proposals." It did not, however, refer to or quote all of the relevant provisions of that particular section. These relevant provisions are set forth as follows:

"102.10 WITHDRAWAL OF PROPOSALS -

Each and every bidder who submits a bid specifically waives any right to withdraw it, except as herein-after provided. Bidders will be given permission to withdraw any proposal after it has been deposited with the Department, provided the bidder makes his request by telephone, telegraph, or in writing to the Secretary. All requests pertaining to the withdrawal shall reach the office of the Secretary not later than 9:00 A.M. on the date set for the opening thereof. Requests by telephone or telegraph shall be confirmed in writing by the bidder, either in person, or by an accredited personal representative, before the hour of the date specified in the proposal for the opening thereof.

"A bidder will be permitted to withdraw any bids which have not been read after he has been declared the apparent low bidder on any other project. In withdrawing bids, the bidder shall make his request to the official in charge of the letting, either in person, or by a duly authorized representative, who shall submit satisfactory credentials showing his authority to act for the bidder interested, at the time that the official in charge requests that any contemplated withdrawals be made and before any proposals on such projects are read. The proposal covered by such requests will be returned to the bidder or his representative, together with the proposal guaranty, and will not be considered thereafter by the Department."

(Emphasis added.)

The Commonwealth Court did not refer to the emphasized portions of the withdrawal provisions, and failed to impart meaning to those portions.

ARGUMENT

Because the Commonwealth Court misconstrued the waiver language contained in the bid instructions, any "non-federal" basis for denying relief to Appellants was meritless; hence, the Pennsylvania Supreme Court could not have rested its judgment of affirmance on a "non-federal" ground.

The section of the bid instructions (102.10) which the Commonwealth Court refers to is not a waiver provision at all. It is a withdrawal of bid provision under the contract specifications. Its effect is to permit withdrawal generally until the date set for bid opening, and

no later, provided certain procedures are followed. The use of the phrase "waives any right to withdraw it" is merely a clumsy and improvident way of stating that the particular right of bid withdrawal which is afforded under the contract specifications expires on the date set for bid opening.

Analyzed in context, section 102.10 is a permissive section and not a restrictive one. There is no true waiver of rights, but merely a mode and time limitations on the withdrawal provision.

There is yet another error in the Commonwealth Court's treatment of the section 102.10 "Withdrawal of Proposals." On its face, section 102.10 deals solely with pre-bid opening withdrawals. It does not purport to deal with extraordinary post-bid opening withdrawals. Only the Pennsylvania legislature purports to

deal with and does deal with post-bid opening withdrawals as set forth in the Pennsylvania Public Contracts Act (Jurisdictional Statement, pp. 3-5).

These are two distinct withdrawal rights -- one a general right created by contract provisions, and the other a limited and extraordinary right created by legislative enactment to redress the risk of financial disaster due to clerical error discovered after the bid opening. Thus, even if the so-called "waiver" language of section 102.10 is given broader meaning than its contextual use justifies, it can be no more than a waiver of that particular withdrawal right granted under the bid instructions. It cannot have impact beyond the scope of that particular withdrawal right, especially in the absence of language expressly extending its effect to different kinds

of withdrawal rights. Put another way, where the withdrawal right created by statute is an extraordinary remedy afforded as an expression of legislative policy to redress a specific peril which is not discovered until after bid opening, it is absurd to view that right as terminated by inapt waiver language directed solely to a general right of withdrawal exercisable only prior to bid opening.

Under the foregoing analysis, the rule of Williams v. Wenger, 319 Pa. 73, 77, 1979 A. 242, 244 (1935) is not relevant. There is simply no real waiver provided under the bid instructions, or, alternatively, any such waiver does not impact on the statutorily created withdrawal right. More important, the "selection" rule of Stembridge v. State of Georgia, 343 U.S. 541, 547, 72 S.Ct.

834, 837 (1952), is not relevant because there is no rational foundation for the notion that the Pennsylvania Supreme Court "might" have predicated its judgment of affirmance on a non-federal ground which is on its face void of merit.

CONCLUSION

Appellee's Motion to Dismiss should be denied and probable jurisdiction should be noted as requested in Appellants' Jurisdictional Statement.

Respectfully submitted,

JACK W. PLOWMAN
Counsel of Record
MARSHALL J. CONN
Plowman and Spiegel
3400 Grant Building
Pittsburgh, PA 15219
(412) 471-8521

Counsel for Appellants